(2)

No. 91-889

In The

Supreme Court of the United States

October Term, 1991

FRANK McCOY, EDWARD ERDELATZ, and PIERRE MERLE,

Petitioners,

vs.

THE HEARST CORPORATION, a California corporation, SAN FRANCISCO EXAMINER, RAUL RAMIREZ and LOWELL BERGMAN,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

BRIEF OF RESPONDENTS RAUL RAMIREZ AND LOWELL BERGMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court has jurisdiction to review a state court order which, applying a state procedural rule on finality of civil judgments, summarily rejected a petition to reinstate a libel judgment entered in 1979 and unanimously reversed by the California Supreme Court in 1986.

Whether the First Amendment to the United States Constitution compels a state court to disregard its rules of finality to reconsider a 1986 decision in a public official libel case, on the claim of a litigant that subsequent legal developments indicate that the court erred in its review of the trial record on the first appeal.

LIST OF PARTIES

The parties to this proceeding in the California Court of Appeal were:

Frank McCoy, Edward Erdelatz, and Pierre Merle, plaintiffs and petitioners;

The Hearst Corporation, San Francisco Examiner, Raul Ramirez and Lowell Bergman, defendants and respondents.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

California Rules of Court, Rule 25:

(a) A remittitur shall issue after the final determination of (1) Supreme Court review of a decision of a Court of Appeal; (2) any appeal; (3) any original proceeding in which an alternative writ or order to show cause has been issued addressed to a lower court, board or tribunal; or (4) any original proceeding determining on the merits the validity of the decision of a lower court, board or tribunal without issuance of an order to show cause or alternative writ. A remittitur shall not be issued when an original petition is summarily denied.

Unless otherwise ordered, the Clerk of the Supreme Court shall issue the remittitur when a judgment of that court becomes final, and the clerk of a Court of Appeal shall issue the remittitur (1) upon the expiration of the period during which review in the Supreme Court may be determined, including any extension of the period granted in the particular cause or (2) as provided in this subdivision or Rule 29.4(c). The remittitur shall be deemed issued on the clerk's entry in the record of the case, and shall be transmitted immediately, with a certified copy of the opinion or order, to the lower court,

board or tribunal. On Supreme Court review of a decision of a Court of Appeal the remittitur shall, unless otherwise ordered, be addressed to the Court of Appeal, accompanied by a second certified copy of the remittitur and by two certified copies of the opinion or order; and the Court of Appeal shall issue its remittitur forthwith after an unqualified affirmance or reversal of its judgment by the Supreme Court, or after finality of such further proceedings as are mandated by the Supreme Court.

Whenever the judgment of the reviewing court changes the length of a sentence to state prison or changes the applicable credits, or changes the maximum permissible period of confinement of a person committed to the custody of the Youth Authority, without requiring further hearing in the trial court, the clerk of the reviewing court shall also transmit a copy of the remittitur and the opinion to the Department of Corrections or to the Youth Authority.

(b) For good cause shown, or on stipulation of the parties, the Supreme Court may direct the immediate issuance of a remittitur. The Court of Appeal may direct the immediate issuance of a remittitur on stipulation of the parties.

(c) A reviewing court, for good cause, may stay the issuance of a remittitur for a reasonable period.

(d) A remittitur may be recalled by order of the reviewing court on its own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion.

(e) Forthwith upon issuance of the remittitur, the clerk of the reviewing court shall mail notice to the parties that it has been issued.

STATEMENT OF THE CASE

This is a public official libel case brought by two homicide inspectors and an assistant district attorney against two reporters, a San Francisco newspaper, and its parent corporation, for a series of investigative news articles questioning the fairness of a murder conviction. The case, now in its sixteenth year, has been heard in three essentially distinct phases by California trial and appellate courts: (1) A 1979 trial, followed by appeals that culminated in a unanimous reversal of a judgment for petitioners by the California Supreme Court (*"McCoy I"*); (2) petitioners' unsuccessful attempts to obtain a second trial (*"McCoy II"*); and (3) petitioners' unsuccessful attempts to reinstate the 1979 judgment (*"McCoy III"*).

A. McCoy I.

1. The Articles.

The libel suit was based on a series of articles, written by respondents Raul Ramirez and Lowell Bergman, and published in the San Francisco *Examiner* in 1976. The articles probed the trial of Richard Lee, who was convicted of the murder of a Chinese youth on July 13, 1972, outside of a housing complex in the Chinatown section of

San Francisco. (C.T. 44-69).[1] During an 18-month investigation, the reporters interviewed 40 people (App. D-18-22), including two eyewitnesses to the killing who provided the reporters with affidavits. The first eyewitness, a sixteen-year-old girl, asserted that she had been pressured and misled by the police and prosecutor in the case into identifying Richard Lee as the assailant at trial. (R.T. 2251, 2725, 3984; C.T. 82, 83, 104, 105). The second eyewitness swore that Richard Lee, whom he knew well, was not present or involved in the shooting and that the police had rebuffed his attempt to clear Lee's name. (R.T. 2178-83; C.T. 109).

The third affidavit obtained by the reporters was executed by Thomas Porter, the star prosecution witness at the Lee trial. Porter testified as a jailhouse informant, telling the criminal jury that while he and Lee were cellmates during pretrial detention, Lee had confessed to the murder. In 1975, Bergman wrote a letter to Porter, then incarcerated in a federal facility in Indiana, to inquire whether Porter would be interested in discussing the case. (App. D-13.) Within days, Porter telephoned Bergman to say that he had lied at the Lee trial in response to threats of violence and promises of leniency from the police and prosecutor, and felt great remorse. (R.T. 1026-27, 1201-02.) Porter subsequently executed a detailed affidavit, drafted by an Indiana attorney, for use

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[1] The record is cited as follows: Petitioners' Appendix is designated "App." The Petition is designated "Pet." The record of pleadings filed below is designated "C.T." The reporter's transcript of the 1979 trial is designated "R.T."

in connection with a writ of habeas corpus on Lee's behalf. (R.T. 440-53; C.T. 75-80, Pl. Ex. 61.)

Lee's petition for a writ of habeas corpus, supported by the affidavits of the two eyewitnesses and Porter, was filed several days after publication of the articles. In connection with the habeas petition, after meeting with representatives of the California Attorney General's office, Porter executed a second affidavit asserting that he had testified truthfully in the murder trial. (R.T. 3795.)

The reporters also interviewed attorneys, journalists, social workers, police officers, and leaders of and experts on San Francisco's Chinatown community. (C.T. 18-22.) At the close of their 18-month investigation, they believed that the evidence that they had accumulated raised serious questions about the validity of Lee's conviction, about San Francisco's criminal justice system and about the treatment of members of racial minorities as accused defendants. (App. D-18-21.) They believed that these issues should be brought to the public's attention. (R.T. 2273-74, 2688, 2743-45.) The *Examiner* published the articles as a three-part series from May 19 through 21, 1976. (App. D-44-69.)

2. The Defamation Case.

Petitioners filed three separate libel actions on November 18, 1976, in San Francisco Superior Court, which were consolidated for further pretrial proceedings and trial. (C.T. 62-66.) The Superior Court ruled that petitioners would be held to satisfy the constitutional standard required of public officials seeking damages for defamation. (C.T. 235.) On April 18, 1979, after a five-

week trial, the jury returned verdicts in favor of the three petitioners totalling $4,560,000. (C.T. 329-331.) The Court of Appeal upheld the judgment on October 23, 1985 (App. E), and denied petitions for rehearing on November 22, 1985.

The California Supreme Court granted review on January 23, 1986. On November 13, 1986, the Court unanimously reversed the judgment, ruling that petitioners had ~~failed~~ to satisfy the constitutional standards for a judgment in a public official libel suit. *McCoy v. Hearst Corp.*, 48 Cal. 3d 835, 231 Cal. Rptr. 518, 727 P. 2d 711 (1986). (App. D.) The Court also ruled that the trial court had erred in excluding testimony about the source of a published statement that petitioner Merle had been the subject of a State Bar disciplinary proceeding (App. D-38-40) and erred in instructing the jury on punitive damages under the wrong California statute. (App. D-40-43.) The Court left several issues unresolved, including state law privilege, evidentiary rulings, and instructions. (App. D-40, n.34.) The remittitur was issued on December 29, 1986. (C.T. 468-468A.)

Petitioners filed a petition for writ of certiorari on February 11, 1987. The issue raised in the petition was whether the California Supreme Court's review of the 1979 trial record complied with the principles of *Bose Corporation v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). This Court denied the petition on May 4, 1987. *McCoy v. Hearst Corp.*, 481 U.S. 1041 (1987). (App. C.)

B. McCoy II.

On December 15, 1988, more than two years after the California Supreme Court had found the articles to be constitutionally protected, petitioners requested calendar preference for a second trial in the case. Relying on a 1936 opinion from the California Supreme Court, *Erlin v. National Union Fire Ins. Co.*, 7 Cal. 2d 547, 61 P. 2d 756 (1936), petitioners claimed that because the Supreme Court's opinion in *McCoy* did not include an express directive for entry of judgment, petitioners were entitled to try the case again. (C.T. 581-615.) Respondents argued that statutory and common law developments since 1936 precluded reliance on the phrasing of the closing words of the opinion in determining its disposition, and that final judgment should be entered for the defense in accordance with the clear intent of the Supreme Court. (C.T. 479-580, 622-710.) The Superior Court granted defendants' motions (C.T. 711-712) and entered judgment on March 15, 1989. (C.T. 713-714.) The Court of Appeal unanimously affirmed that judgment on March 1, 1991. *McCoy v. Hearst Corp.*, 227 Cal. App. 3d 1657, 278 Cal. Rptr. 596 (1991). (App. F.) The California Supreme Court, without dissent, denied review of that decision on May 31, 1991. (App. G.)

C. McCoy III.

On May 16, 1991, petitioners filed a motion in the Court of Appeal to recall the remittitur issued in *McCoy I* in 1986. Petitioners claimed that the state Supreme Court's review of the record was inconsistent with principles articulated in this Court's decision, three years later,

in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). Thus, petitioners contended that the 1979 judgment unanimously reversed by the Supreme Court should be reinstated.

Respondents opposed the petition on grounds that state courts lacked jurisdiction, under California procedural law, to recall a remittitur for the purpose of reconsidering the merits of an appeal that had become final. Respondents also contested petitioners' assertion that the state Supreme Court's record review has been improper, and argued that the 1979 judgment could not be reinstated because *McCoy I* established, independent of its constitutional holding, that the judgment was flawed by an erroneous instruction and discovery sanction.

The Court of Appeal, without dissent, summarily denied petitioners' motion to recall the remittitur on June 10, 1991. (App. A.) The California Supreme Court, without dissent, rejected petitioners' request for review of the Court of Appeal's summary denial of the motion to recall the remittitur on August 28, 1991. (App. B.)

Petitioners now seek this Court's review of the Court of Appeal order summarily denying their motion to recall the remittitur. They filed their petition for a writ of certiorari to the California Court of Appeal on November 26, 1991.

REASONS FOR DENYING THE WRIT

Petitioners' second petition for certiorari does not satisfy either the jurisdictional requisites or the substantive standards for this Court's review.

First, the California courts' summary denial of petitioners' motion to recall the remittitur plainly rests on adequate and independent state grounds. California procedural law prohibits recall of remittitur to reconsider the merits of civil appeals that have become final. The orders entered in this case reflect consistent and uniform California precedent on finality of civil actions. This procedural rule promotes the state's significant interest in conserving judicial resources.

Second, petitioners do not properly assert any federal constitutional rights. The First Amendment issue presented in the petition for certiorari is precisely the issue that this Court declined to hear in 1987: whether the California Supreme Court conducted an appropriate review of the 1979 trial record. The First Amendment does not entitle petitioners, as public official libel plaintiffs, to a constitutionally determined scope of appellate review. Accordingly, the California courts' refusal to conduct a second review of the trial record of this defamation suit infringes no federal constitutional rights.

I.

THE CALIFORNIA COURT OF APPEAL'S SUMMARY DENIAL OF PETITIONERS' MOTION TO RECALL THE REMITTITUR RESTS ON ADEQUATE AND INDEPENDENT STATE PROCEDURAL GROUNDS

In requesting California courts to recall the *McCoy I* remittitur[2] to reconsider the merits of an appeal that had been final for five years, petitioners were seeking a result that was plainly unauthorized by state law. California appellate courts were divested of jurisdiction over *McCoy I* in 1986 by issuance of the remittitur. Their residual jurisdiction was limited to recall a remittitur issued by inadvertence or fraud. As the California Supreme Court has defined the extremely narrow basis for recall of remittitur under state law:

> [T]he extraordinary remedy by motion to recall the remittitur may be invoked only in cases of fraud or imposition practiced upon the court or upon the opposite party, or where the judgment was based on a mistake of fact or occurred through inadvertence. None of these is present when the court renders the judgment advisedly upon the case as presented by the parties. . . . Mistake or inadvertence is not supported by a declaration that on the presentation of the same

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[2] In California, remittitur "is the term employed to designate the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken or over which its controlling jurisdiction is exercised, and corresponds to the 'mandate' used in the practice of the United States Supreme Court." *Noel v. Smith*, 2 Cal. App. 158, 162, 83 P. 167 (1905). Issuance and recall of remittitur in California appellate courts are governed by California Rules of Court, Rule 25.

> facts and matters in issue the court now arrives at a different conclusion on the merits. A motion to recall the remittitur is not justified as an opportunity to the parties to relitigate their cause nor to the appellate court to redetermine the merits.
>
> *Southwestern Inv. Corp. v. City of Los Angeles*, 38 Cal. 2d 623, 629-630, 241 P. 2d 985 (1952).

Petitioners plainly failed to satisfy the grounds for recall of remittitur. They did not claim fraud or inadvertence, but rather that the California Supreme Court had improperly reviewed the 1979 libel record. They sought to "relitigate their cause." Under settled California doctrine, state courts lacked jurisdiction to "redetermine the merits" of the case through recall of remittitur. "[A]n appellate court has no appellate jurisdiction of its own judgment; and it has no power to recall the remittitur for the purpose of reconsidering or modifying its own judgment on the merits." *Southwestern Investment*, 38 Cal. 2d at 629.

No California case has authorized the relitigation of final civil judgments through recall of remittitur. Such claims are uniformly rejected. In *Kohle v. Sinnett*, 136 Cal. App. 2d 34, 288 P. 2d 139 (1955), for example, the court stated:

> The office of the remittitur is to return the proceedings which have been brought up by the appeal to the court below, and when the remittitur has been duly filed the proceedings from that time are pending in that court and not in this; and in regard to them it is not competent

> for this court to make any further order. (citation omitted.) The established grounds for recall of remittitur . . . constitute an exception to the general rule and the exception does not embrace a relitigation of issues that have in truth been considered and decided by the appellate court even if it could be successfully argued that the decision was erroneous.
>
> We think it apparent that the statement of grounds for recall show that if granted the court could do no more than reconsider that which it heretofore considered when rendering its decision. We have no power to recall the remittitur for such purpose.
>
> 136 Cal. App. 2d at 37.

California courts have specifically rejected efforts of disappointed civil litigants to reopen civil appeals on the theory that an appellate court improperly reviewed the record. *See, eg., Davis v. Basalt Rock Co.*, 114 Cal. App. 2d 300, 250 P. 2d 254 (1952).

California's prohibition against relitigation of the merits of an appeal through recall of remittitur was plainly the basis for the orders entered in this case. The state appellate courts refused to hear petitioners' motion because no procedural mechanism exists for reinvesting an appellate court with jurisdiction to reconsider its own decision.[3]

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[3] In addition, the state Court of Appeal clearly lacked jurisdiction under California law to disturb a judgment issued by the California Supreme Court. See *McCoy II*, App. F-10-11. This also furnishes an independent state basis for the Court of Appeal's decision.

California's procedural doctrine on finality of civil cases, independent of federal principles, is adequate to support the challenged orders. Because the rulings rest on adequate and independent state law, review by this Court is inappropriate:

> It is, of course, a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, but also in cases involving procedural grounds.
>
> *Henry v. Mississippi*, 379 U.S. 443, 446 (1965).

A state procedural doctrine furnishes an adequate and independent state grounds for decision, provided that it is uniformly invoked, *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982), and promotes a legitimate state interest, *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978). California's rule of finality, applied to bar recall of the 1986 remittitur in this case, clearly satisfies those requirements.

In refusing to entertain petitioners' motion, California courts followed uniform precedent limiting recall of remittitur to the extraordinary situation of fraud or inadvertence. Petitioners are unable to cite any California authority, because none exists, for recall of remittitur to reopen a closed case years later, for the sole purpose of

readjudicating the merits of a civil appeal.[4] Petitioners sought a novel expansion of a strictly limited procedure. The challenged orders therefore represent application of settled state procedural law.

California's limitations on recall of remittitur promote the state's policy of finality in civil lawsuits. As a large state with congested courts, California obviously has a significant interest in preventing unnecessary and duplicative litigation. The state's highest court has recently stressed that "enhancing the finality of judgments and avoiding an unending roundelay of litigation" is an important policy. *Silberg v. Anderson*, 50 Cal. 3d 205, 214, 266 Cal. Rptr. 638, 786 P. 2d 365 (1990).

In claiming that the United States Constitution compels California to abandon its rules on finality, petitioners are seeking an extraordinary federal intrusion into state autonomy. As this Court has noted:

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied to its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case

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[4] Petitioners' own briefs provide the clearest evidence of the unprecedented nature of their request to reconsider the merits of their case: The only authorities cited to the state courts, and to this Court, are criminal cases, in which recall of remittitur was authorized as an ancillary remedy to a writ of habeas corpus. Pet. 7-8, citing *People v. Mutch*, 4 Cal. 3d 389, 93 Cal. Rptr. 721, 482 P. 2d 633 (1971); *People v. Valenzuala*, 175 Cal. App. 3d 381, 222 Cal. Rptr. 405 (1985).

turns entirely upon questions of local or general law.

> *Wolfe v. North Carolina*, 364 U.S. 177 (1965).

The challenged order summarily denying petitioners' motion to recall the 1986 remittitur is thus beyond the jurisdiction of this Court.

II.

THE RULING BELOW, ENFORCING CALIFORNIA'S RULES OF FINALITY, DOES NOT IMPLICATE FIRST AMENDMENT RIGHTS

Petitioners have pursued this public official libel case for over 15 years. They have consumed a substantial share of California's judicial resources. Nothing in the United States Constitution compels the state appellate courts to review the 1979 trial record yet another time.

Petitioners make the extraordinary claim that the First Amendment requires the California Supreme Court to conduct a second review of a 4500-page trial record, five years after the case was closed. This contention fundamentally misperceives the interaction of the First Amendment with state tort remedies for defamation.

In *Bose* and *Harte-Hanks*, this Court addressed the standard of review required by the First Amendment when libel *defendants* appeal jury awards against them. Nothing in the First Amendment, however, entitles libel *plaintiffs* to a constitutionally determined standard of review. Indeed, California could abolish the tort action for defamation tomorrow without offending the First

Amendment. Thus, petitioners' contention that the California Supreme Court failed to give proper deference to the jury's determinations in this case, even if true,[5] raises at most a state law issue.

It follows, therefore, that the California Supreme Court's unanimous decision after review of the 1979 trial record infringes no First Amendment rights. The orders subsequently entered by California courts, refusing to reopen the case, also infringe no First Amendment rights. To the contrary, those rulings foster freedom of the press, by preventing unnecessary protraction of this 15-year-old public official libel case.

CONCLUSION

Because the California court orders reflect settled state procedural law, and raise no federal issues, there is

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[5] Petitioners' characterization of the California Supreme Court's 1986 decision is inaccurate. (Pet. 7-9.) The Court did not disturb the jury's credibility choice in concluding that petitioners had failed to establish constitutional malice. Petitioners' case for malice depended on their proving that reporter Lowell Bergman knowingly solicited a false affidavit from inmate Henry Porter. The court ruled that *Porter's* testimony, even if believed, was insufficient to establish clearly and convincingly that Bergman asked him to furnish a false affidavit. (App. D-27-31.) Performing the independent review mandated by *Harte-Hanks*, the court properly concluded that testimony critical to petitioners' case, even if uncontradicted, was inadequate to establish constitutional malice. *Cf. Harte-Hanks*, 491 U.S. at 689 n. 35, citing *Bose*, 466 U.S. at 512.

no basis for this Court's review. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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